No. 90-1304

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1990

ORLANDO CORIZ, JR., by and through
next friends ORLANDO CORIZ
and BERNICE D. CORIZ,

Petitioners,

v.

ARTHUR MARTINEZ and CARLOS GUILLEN,
in their individual capacities only,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March 21, 1991

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Ingraham v. Wright, 430 U.S. 651 (1977). 1

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STATUTES:

New Mexico Tort Claims Act, §§ 41-4-1, et seq., N.M.S.A. (1978). 3

REASONS FOR DENYING THE WRIT

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS NOR RAISE AN IMPORTANT FEDERAL QUESTION

The decision below constitutes a narrow and unimpeachable application of qualified immunity doctrine which hardly merits review by this Court. The labored questions purportedly presented for review (Pet. i-vi) cannot mask the absence of either a conflict among the federal courts or an important federal question demanding resolution.

The qualified immunity analysis in both the district court and the Court of Appeals was straightforward. Petitioner, a public high school student, sought damages for denial of procedural due process arising from an alleged assault by a student aide in the course of discipline (Pet. A-2). If New Mexico afforded adequate post-deprivation remedies, they would satisfy due process requirements, Ingraham v. Wright, 430 U.S. 651, 682 (1977). If adequate post-deprivation remedies were not available, Petitioner's rights

would have been violated absent pre-deprivation process.

At the time of the incident complained of, an objectively reasonable school official could not have determined with certainty whether New Mexico did or did not provide adequate post-deprivation remedies. Opinions of two judges of the United States District Court for the District of New Mexico directly conflicted on this issue, Garcia by Garcia v. Miera, 817 F.2d 650, 656 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988). The Court of Appeals for the Tenth Circuit had previously acknowledged the split of decisions while taking no action to resolve it, id. Based on that conflict, neither the district court nor the Court of Appeals had any difficulty in awarding qualified immunity to the Defendants here (Pet. C-5-6, A-6).

The controlling New Mexico state court decision delineating the available state remedies

was equally unclear. In Garcia v. Albuquerque Public Schools Board of Education, 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), cert. quashed, 95 N.M. 426, 622 P.2d 1046 (1981), the New Mexico Court of Appeals affirmed the district court's dismissal of a complaint by a student allegedly hit by his public school teacher because the defendants had immunity under the New Mexico Tort Claims Act, §§ 41-4-1, et seq., N.M.S.A. (1978). Nevertheless, the New Mexico Court of Appeals modified the lower court's order of dismissal to make it "without prejudice," id., at 385, based on two judges' recognition that a cause of action for excessive punishment was still viable notwithstanding the ostensible bar of sovereign immunity.[1]

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[1]Petitioner's citation of the later Gallegos v. State, 107 N.M. 349, 352, 758 P.2d 299 (Ct. App. 1987), cert. quashed, 107 N.M. 314, 757 P.2d 370 (1988), as precluding evasion of the bar of sovereign immunity (Pet. 6, n.1) is unavailing. Even according that case the interpretation claimed by Petitioner, it was decided after the incident

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Uncertainty in the law at the time an official acts is determinative of qualified immunity, Mitchell v. Forsyth, 472 U.S. 511 (1985). The "decisive fact" is not that the official's position on the law "turned out to be incorrect, but that the question was open at the time he acted", id., at 535. To deny qualified immunity because an official "gambled and lost on the resolution of this open question departs from the principles of Harlow. Such hindsight-based reasoning on immunity issues is precisely what Harlow rejected," id. Officials "are not subject to suit when such questions are resolved against them only after they have acted," id.

Apart from the obvious correctness of the decision below, the Petition demonstrates neither a conflict with decisions in other federal courts

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complained of here. Furthermore, the conflict among the federal courts, unresolved by the Court of Appeals for the Tenth Circuit, would still mandate qualified immunity.

nor a misapplication of qualified immunity concepts. Petitioner makes a tortured argument that the Court of Appeals for the Tenth Circuit failed to complete its analysis by not determining whether, under the particular facts alleged, a violation of clearly established law occurred. (Pet. 16-17). Petitioner overlooks the fact that the direct conflict among subordinate courts, which the Court of Appeals had not previously resolved, precluded a finding that the inadequacy of New Mexico's remedies was clearly established under **any** conceivable set of facts. Petitioner's inclusion of excerpts from the two earlier district court decisions (Pet. Apps. F, G) amply demonstrates that precisely the same legal issue as in the present case had been addressed and decided in diametrically opposing ways. It is hard to imagine a purer "issue of law" mandating qualified immunity, independent of factual context, Mitchell v. Forsyth, supra, at 530.

Therefore, this case does not require resolution of the supposed conflict among the appellate circuits as to the necessary level of factual correspondence between earlier precedents and the case under consideration (Pet. 17). For the same reason, this case is not a fit vehicle for broadly specifying the types of decisional conflicts justifying qualified immunity (Pet. 20-22). There could be no more formidable conflict than one between courts in the very district having jurisdiction over the litigants, a conflict acknowledged and unresolved by the governing circuit court. Petitioner cites no instance in which such a conflict has been held insufficient for an award of qualified immunity.

Petitioner's argument that unreported cases should not be the basis for a determination of clearly established law (Pet. 23), ignores the fact that the Court of Appeals in a **published** decision acknowledged the conflict among

subordinate courts and declined to resolve it, Garcia by Garcia v. Miera, supra. Far from basing a determination of clearly established law on unreported cases, the Court of Appeals determined that the law was **not** clearly established.

Finally, Petitioner makes two diffuse arguments (Pet. 23-28), apparently requesting a determination of the adequacy of New Mexico's tort remedies for excessive punishment in light of the New Mexico Tort Claims Act, supra, and asserting that the supposed bar it imposes is a denial of equal protection. The equal protection argument was not raised below. An after-the-fact determination of law (e.g., whether the New Mexico statute does or does not provide a tort remedy) does not preclude an award of qualified immunity, Mitchell v. Forsyth, supra, at 535. Petitioner could easily have secured this determination by seeking certification at an earlier stage to the New Mexico Supreme Court (Pet. A-7, n.3), which it

declined to do. Petitioner has failed to demonstrate why the time of this Court is required to resolve this issue.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.[2]

Respectfully submitted,

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March 21, 1991

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[2]Pursuant to U.S.Sup.Ct.Rule 15.1, Respondents point out three instances in which the Petitioner has inserted argumentative material in brackets in a quotation (Pet. iii, 5-6, 17).